

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 United States of America,
10 Plaintiff,
11 v.
12 David Allen Harbour,
13 Defendant.
14

No. CR-19-00898-001-PHX-DLR
ORDER

15
16 Before the Court is Defendant's motion to dismiss forfeiture count as it relates to
17 alleged investor-victims R.G, A.W., D.W., C.H., and P.H and to dismiss counts 11 and 12,
18 which is fully briefed. (Docs. 199, 212, 214.) For the following reasons, Defendant's
19 motion is denied.¹

20 A defendant may move to dismiss an indictment for failure to state an offense. Fed.
21 R. Crim P. 12(b)(3)(B)(v). In determining whether to grant a motion to dismiss, the Court
22 is required to "accept the truth of the allegations in the indictment in analyzing whether a
23 cognizable offense has been charged." *United States v. Boren*, 278 F.3d 911, 914 (9th Cir.
24 2002) (citation omitted). Although both parties argued facts not alleged in the indictment,
25 when addressing "a pre-trial motion to dismiss an indictment for failure to state an offense,

26
27 ¹ Because of the nature of the issues presented, the Court finds that oral argument is
28 not necessary or useful. Accordingly, the request for oral argument is denied. *See Mahon*
v. Credit Bur. of Placer County, Inc., 171 F.3d 1197, 1200 (9th Cir.1999); *Vasquez v. City*
of Phoenix, Nos. CV-04-481-PHX-DGC, CV-05-608-PHX-DGC, 2006 WL 1147716, at
*1 n. 1 (D. Ariz. May 1, 2006).

1 the district court is bound by the four corners of the indictment.” *Id.* “A motion to dismiss
2 the indictment cannot be used as a device for a summary trial of the evidence.” *United*
3 *States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1995) (quoting *United States v. Marra*, 481
4 F.2d 1196, 1199 (6th Cir. 1973)). And, the Court can consider a motion to dismiss only
5 where it involves questions of law rather than fact. *United States v. Shortt Accountancy*
6 *Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986).

7 Defendant argues that the forfeiture count, insofar as it relates to R.G., A.W., D.W.,
8 C.H., and P.H (the “Victim-Investors”), should be dismissed for two reasons. To begin, he
9 argues that dismissal is appropriate because the superseding indictment (“SSI”) fails to
10 show a nexus between the Victim-Investors’ funds and the scheme charged. Defendant
11 made an identical argument seeking to dismiss the forfeiture count as to R.G.’s transaction,
12 which the Court rejected in its September 11, 2020 order. (Doc. 132.) In denying
13 Defendant’s first motion to dismiss, the Court explained,

14 [T]he government need not establish a factual nexus between
15 R.G.’s transaction and the charged conduct in the indictment at
16 this juncture. Rather, at trial, the government must establish a
17 factual nexus between the forfeiture money judgment and the
18 charged illegal activity. . . . *U.S. v. DeFries*, 129 F.3d 1293
19 (D.C. Cir. 1997) (at trial, to prevail in securing a forfeiture
20 order, the government must establish a causal link between the
violation and the property); *U.S. v. Dote*, 150 F.Supp.2d 935,
943 (N.D. Ill. 2001) (the amount of money subject to forfeiture
is a matter for the government to prove at trial and a question
of fact, not a matter the Court can resolve on a motion to
dismiss).

21 (*Id.* at 3.) Despite no change in law, Defendant nevertheless repeats his prior argument as
22 to R.G and extends it to four additional victim-investors—A.W., D.W., C.H., and P.H.
23 Because the government is not required to establish a nexus between the Victim-Investors’
24 transactions and the conduct charged in the SSI prior to trial, the Court rejects this
25 argument.

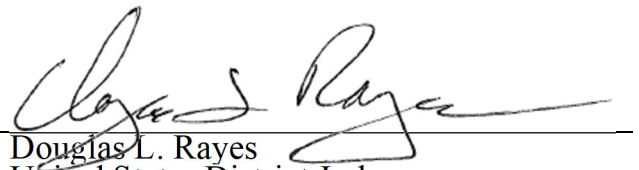
26 Relatedly, Defendant argues that the forfeiture count as it relates to the Victim-
27 Investors should be dismissed because the inclusion of such funds is an attempt to bypass
28 the five-year statute of limitations. Defendant’s argument is misguided. The government

1 may seek forfeiture of all proceeds tied to a scheme, not merely those acquired within the
 2 statute of limitations period. *See* 18 U.S.C. § 981(a)(1)(C) (providing that “[a]ny property,
 3 real or personal, which constitutes or is derived from proceeds traceable” to mail fraud,
 4 wire fraud or a conspiracy to commit mail and wire fraud is subject to forfeiture); *U.S. v.*
 5 *Emor*, 850 F. Supp. 2d 176, 217 (D.D.C.2012) (quoting *U.S. v. Venturella*, 585 F.3d 1013,
 6 1015 (7th Cir. 2009)) (“When a defendant has engaged in a mail or wire fraud scheme,
 7 forfeiture is not limited to the proceeds gained through the particular mailing or wire
 8 transaction on which the conviction was based; rather, it ‘extends to the entire scheme’ of
 9 which the mailing or wire transaction was a part.”). Defendant’s motion as to the forfeiture
 10 count is therefore denied.

11 Next, Defendant argues that counts 11 and 12 of the SSI should be dismissed
 12 because the government will not be able to show that the two relevant 2016 payments from
 13 Defendant’s entities to A.W. and C.H. were made in furtherance of an alleged mail fraud
 14 scheme, noting that the scheme that Defendant believes the government is connecting the
 15 payments to—the KSQ scheme—collapsed two years prior. *See U.S. v. Hubbard*, 96 F.3d
 16 1223, 1227-28 (9th Cir. 1996) (“A violation of the mail fraud statute involves: 1) the
 17 existence of a scheme to defraud, and 2) using or causing the use of mails in the furtherance
 18 of the scheme.”). In doing so, Defendant appears to be arguing about issues of fact that the
 19 Court cannot resolve on a motion to dismiss. *Jensen*, 93 F.3d at 669. The SSI clearly and
 20 concisely alleges the elements of wire fraud; whether the government can meet those
 21 elements at trial is not a determination the Court will make at this juncture. Accordingly,

22 **IT IS ORDERED** that Defendant’s motion to dismiss (Doc. 199.) is **DENIED**.

23 Dated this 9th day of March, 2021.

24
 25
 26 
 27 Douglas L. Rayes
 28 United States District Judge